No. 84-1025

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IN THE

Supreme Court of the United States

October Term, 1984

BRUCE H. GREENFIELD, individually and as a representative of a class of persons similarly situated,

Petitioner,

v.

HEUBLEIN, INC.

and

R. J. REYNOLDS INDUSTRIES, INC.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Questions Presented

(1) Does a corporation which is not buying or selling its own securities have an obligation under the federal securities laws to disclose preliminary contacts with a possible merger partner, where there have been no negotiations regarding the price of any proposed merger?

(2) Did the District Court and Court of Appeals err in holding that it was not false or misleading for a corporation:

(a) to respond to an inquiry from the New York Stock Exchange that it was aware of no corporate development that would explain the activity in its stock on a particular day where the undisputed evidence was that such response was accurate?

(b) to decline to speculate publicly that a leak or rumor was causing the activity, when the corporation was not responsible for any leak or rumor?

(3) Did the lower courts err in holding that in the circumstances of this case the ebb and flow of discussions between a corporation, which was not buying or selling its own securities, and a perceived raider did not constitute a material fact and was not required to be disclosed?

The Parties

This statement is submitted pursuant to Rule 28.1 of this Court. Heublein, Inc. ("Heublein") is a wholly owned subsidiary of R. J. Reynolds Tobacco Company, a New Jersey corporation, which in turn is a wholly owned subsidiary of R. J. Reynolds Industries, Inc., a Delaware corporation ("Reynolds"). Neither Heublein nor Reynolds has any subsidiaries or affiliates which have any publicly held securities.

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Respondents Heublein, Inc. ("Heublein") and R. J. Reynolds Industries, Inc. ("Reynolds") respectfully request that this Court decline Bruce H. Greenfield's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

Statement of the Case

This petition arises out of the affirmance by the Court of Appeals of the dismissal of a securities action brought against Heublein and Reynolds by Greenfield, a former Heublein shareholder. Greenfield sold his Heublein stock on July 27, 1982, shortly before the announcement on July 29, 1982, of a tender offer for Heublein shares by Reynolds and a proposed merger thereafter between Heublein and a Reynolds' subsidiary. Greenfield claimed that a Heublein press release issued on July 14, 1982, should have disclosed the possibility of such a tender offer and merger, as well as certain discussions between Heublein and a third company, General Cinema Corporation ("General Cinema"), which owned 18.9% of Heublein's stock. Greenfield claimed that the press release was false and misleading, and that Reynolds had aided and abetted Heublein's alleged violations by remaining silent when the statement was issued. The District Court granted respondents' motion for summary judgment, and the Court of Appeals affirmed.

Greenfield's statement of facts makes no reference to the opinions of the District Court and the Court of Appeals, and in numerous instances distorts the record below by use of partial and out-of-context quotations. The facts as recited by the lower courts are virtually undisputed.* The decisions below were rendered upon a full record. Prior to the filing of respondents' motion for summary judgment, Greenfield had deposed all the executives of Heublein and Reynolds who had been involved in the events giving rise to

* Where there were disputed facts both the District Court and the Court of Appeals viewed them, on this summary judgment motion, in the light most favorable to plaintiff.

the action. Greenfield also sought and obtained relevant documents from respondents and from the New York Stock Exchange. Accordingly, the lower courts had before them all those facts from discovery which bore on plaintiff's claim.

1. The General Cinema Acquisitions of Heublein Stock

The chain of events of interest in this action began with large acquisitions of Heublein stock by General Cinema. Between November 18, 1981 and February 1, 1982, General Cinema made open market purchases of 2.1 million shares of Heublein stock, just under 10% of the shares then outstanding. In a Schedule 13D filed with the Securities and Exchange Commission on February 3, 1982, General Cinema disclosed its purchases, stating that the shares had been purchased "for investment only." At the same time, however, General Cinema stated that it intended to increase its ownership of Heublein to more than 15% and to make a Hart-Scott-Rodino filing which would enable it to buy up to 49.9% of the shares outstanding.

Heublein opposed General Cinema's actions. It established a high level executive group "to look into ways of defusing the General Cinema moves." (A4).* Included in the strategy group were Watson (Heublein's Chairman), Waldron (President), Caspar (General Counsel), and Gillespie (who functioned as chief of staff), as well as several others.

Among the early defensive steps taken by Heublein were the initation of suit against General Cinema and pur-

* References in this form are to the Appendix filed by Petitioner. References in the form "(JA ——)" are to the Appendix filed in the Third Circuit.

chase by Heublein of General Cinema stock. In addition, Heublein pursued negotiations with General Cinema looking to either a standstill agreement or an asset swap. From the beginning the Heublein group knew that one conceivable option was to seek a white knight, *i.e.*, to sell the company to a friendly suitor. As Watson testified, it was, however, clearly understood by the Heublein Board and by Waldron and Watson that they would "fight to the end . . . before [they] became a party to any sale of the company," whether to General Cinema, a white knight, or anyone else. (JA1340). The white knight alternative was repugnant to Heublein which fully intended to remain independent; selling the company to anyone would only be considered as a last resort. In accordance with this understanding, Waldron and Watson did not permit the subject of a white knight even to be discussed at the strategy group meetings. Instead, they actively pursued other, less drastic alternatives for solving the General Cinema problem.

In the meantime, Reynolds had become interested in acquiring Heublein. In May, Reynolds began a confidential study of that possibility. Thereafter, Reynolds' management concluded that Heublein was an attractive acquisition possibility, but that Reynolds should not become embroiled in any bidding contest to gain control of Heublein. (A4). Reynolds' Chairman, Sticht, advised Waldron in June that Reynolds would take no hostile action against Heublein, but that Sticht was interested in Heublein joining Reynolds. Waldron replied that Heublein intended to remain independent and he believed strongly that the company would be able to do so.

In early June, General Cinema announced that it had acquired 18.9% of Heublein stock, and that it had stopped

buying Heublein stock for the time being. Thereafter, Heublein and General Cinema continued their discussions looking toward a standstill agreement. By July 7, 1982, Waldron felt that he and Smith, General Cinema's Chairman and President, were very close to a standstill agreement. However, on July 8, Smith called Waldron and radically changed his position, demanding that the standstill include terms which he knew were unacceptable to Heublein and which he called "non-negotiable." (A50).

2. The July 9 Meeting

Concerned over General Cinema's continually shifting position, Waldron decided it might be prudent to follow up on his June discussion with Sticht. Waldron called Sticht who agreed to meet in Connecticut on Friday, July 9. Waldron and Watson decided that it was premature to discuss this meeting with other members of Heublein's management and they did not tell the strategy group as a whole about the planned meeting. The only people informed of the decision to meet with Sticht were Caspar and Gillespie of Heublein, McNally (Heublein's outside counsel), Krimendahl (Heublein's investment banker) and Fleischer (counsel to the investment banker). Waldron told these persons that the sole purpose of the meeting was to become acquainted and not to open negotiations with Reynolds; he further told them to keep the fact of the meeting strictly confidential. (JA1421-24).

At the meeting with Sticht, Waldron opened the discussion by explaining that he and Watson wanted to learn more about Reynolds, but not to negotiate a possible combination. He reiterated that Heublein intended to remain an independent company and asked for and received Sticht's

confirmation that the meeting would not lead to any hostile action by Reynolds against Heublein. Sticht spent most of the time describing Reynolds' management philosophy. At the end of the meeting, Waldron and Watson thanked Sticht for coming but reiterated that Heublein had no interest in joining Reynolds if it could find any other solution to the General Cinema problem. As the Third Circuit found, confirming the finding of the District Court (A81), "no formal understanding or agreement was reached" at that meeting. (A5). Following the meeting, Gillespie, Krimendahl, McNally, and Caspar of the Heublein strategy group were informed of the discussions.

3. Heublein's July 14, 1982 Release

Just prior to the close of the market on Wednesday, July 14, a representative of the New York Stock Exchange called Caspar and told him that Heublein's stock was up 3⅞ dollars to $44 on a trading volume of 235,000 shares. The Exchange inquired whether Heublein would issue a "no corporate development" statement. (JA1373). Caspar responded that Heublein had no knowledge of a material corporate development and that he was in a position to know, but that he would double check and get back to the Exchange. (JA1374). At the time he made this response, Caspar knew about the meeting with Sticht that had occurred on July 9, was confident that that information about the July 9 meeting had not been leaked by any of the four Heublein representatives or the three outside advisors who had knowledge of it, and furthermore knew that in any event, given the nature of the meeting, it was not a material corporate development. (JA1378-79, 1381- 2).

Caspar was also aware of the pattern of trading on July 14. (JA1396). At 10:30 that morning, shortly after the market opened, a 100,000 share institutional trade had been made without any significant change in price. At 2 P.M. that afternoon a total of only 153,800 shares, including that 100,000 share block, had been traded. At that point, the stock was only up 5/8ths of a point from $40\frac{1}{8}$ to $40\frac{3}{4}$. It was only in the last hour of trading that the stock moved up to $44 on a closing volume of 242,500 shares. Caspar had no idea what caused the later price and volume activity. (JA1382, 1397-99).

Based on the advice of Heublein's outside advisors, Caspar believed that General Cinema could not resume its purhases of Heublein stock without first amending its Schedule 13D, the last amendment of which had disclaimed the present intention to purchase more Heublein stock.* Caspar believed that the only possible explanation for the trading activity lay in other rumors circulating in the market, especially one concerning a possible Nestle takeover bid, which in fact never materialized and was in any event known to the Exchange. (JA486). This rumor, of course, was not a Heublein corporate development.

After his initial discussion with the Exchange, Caspar discussed the situation with Gillespie and McNally, both of whom knew about the July 9 meeting with Sticht (both Waldron and Watson were unavailable that afternoon). Caspar, Gillespie and McNally agreed that the July 9 meet-

* Caspar was correct in dismissing the possibility of purchases by General Cinema as the cause of the market activity; the Exchange contacted General Cinema on July 14 and confirmed that General Cinema was in fact not in the market. (JA484-86). Even if it had been, General Cinema purchases unbeknownst to Heublein could not have been a Heublein corporate development.

ing was not a corporate development and did not require disclosure. Caspar then drafted a statement with which McNally as an outside counsel and Gillespie concurred. As reported by Dow Jones, the statement read:

> "A spokesman for Heublein, Inc. said the company was aware of no reason that would explain the activity in its stock in trading on the New York Stock Exchange today."

Waldron, who was out of the office when the Stock Exchange called, reviewed the statement the next morning before the Stock Exchange opened and was in complete agreement with what was said.*

4. The Events of July 15-23

Heublein had an additional preliminary meeting with Reynolds on the evening of July 15. This meeting was set up in the morning of July 15 and took place that evening.** Waldron began the meeting as he had on July 9, stating that the purpose of the meeting was a "what if" discussion, since Heublein was still hopeful of fending off General Cinema. Again, no negotiations took place, and both of the courts below found, based on a full record of the testimony of all participants, that no discussion, much less agreement, as to price occurred at this meeting. (A6, A80-81).

Subsequent to the meeting of July 15, Waldron and

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* The price of Heublein stock did not decline after the press release, but remained in the range of $42½-45¼ for the next two weeks. Indeed, Greenfield sold his stock on July 27 at $45.25, higher than the stock had traded on July 14 or 15.

** Greenfield asserts, without record citation, that the call to set up the meeting took place on July 14 (Pet. Br., p. 7). The record is undisputed, however, that Waldron called Sticht on July 15, and suggested a meeting for the following week. (JA1139). Sticht then suggested that the meeting take place that evening. (JA1006-07).

others at Heublein continued to negotiate with Smith and others at General Cinema.* A meeting took place on July 21, and telephone conversations continued through Friday, July 23, at which time Waldron finally became convinced that he could not reach agreement with Smith. While leaving the discussions open with Smith, Waldron and Watson decided on that date that they should seriously consider beginning negotiations with a white knight. Thus on the afternoon of July 23, Waldron contacted Sticht and suggested that the Heublein and Reynolds investment bankers meet to begin discussing a possible merger.

5. The Merger Negotiations and Announcement

On Monday, July 26, the two investment bankers met in New York City. These were the first discussions between Reynolds and Heublein or their investment bankers concerning a price Reynolds might pay for Heublein shares if the companies were to combine. At the end of a day of negotiating, the parties were $12 a share apart—Reynolds at $53, Heublein at $65. When multiplied by the shares outstanding, this was a $260,000,000 difference. Faced with this impasse, the principals decided to meet personally.

On the next day, Tuesday, July 27, Sticht and Abely of Reynolds and Waldron and Watson met to begin the dis-

* On the morning of July 14, Waldron had received a telephone call from Smith of General Cinema who told Waldron that General Cinema was about to make an announcement, but it should not in any way be upsetting to Heublein. Waldron surmised—but was not told by Smith—that the planned announcement involved the sale of General Cinema's Miami television station (JA1144-46). Waldron feared that General Cinema could then be in a position to use the very substantial proceeds of such a sale eventually to buy more Heublein stock. The sale in fact did not take place until many months later; the agreement was not made until December, 1982, and the sale was closed shortly before March 15, 1983. (A88).

cussions anew. At the end of that second day, the parties were finally able to agree to a melded price of $60 for a combined tender offer and merger transaction. Late that afternoon, the bankers and lawyers were summoned and charged with seeing that the crucial step was initiated—structuring the transaction to ensure its acceptance in the marketplace, which involved among other things determining the price and number of shares to be bought in the tender offer, and valuing the securities to be offered on the back-end.

At that point, the parties immediately ran into serious problems over the structure of the transaction. Reynolds insisted on a right to withdraw if anyone succeeded in acquiring 33% or more of Heublein stock before the proposed merger occurred since such a person or group could block the merger under Connecticut law. This was not an unrealistic possibility as General Cinema already owned 18.9%, and would be free to purchase shares during the twenty-day period during which Reynolds would be precluded from beginning its purchase of Heublein shares pursuant to the tender offer. This dispute remained unresolved as the lawyers and bankers worked to put the rest of the transaction together.

On Wednesday, July 28, the New York Stock Exchange called Heublein at midday and advised Caspar that Heublein stock was up 2½ points and trading at 47¾. It requested that Caspar issue a "no corporate developments" release. Caspar stated that he could not make such a release because there was a matter in midstream about which Heublein was not in a position to make a statement. The release issued by Heublein at 1:20 P.M. stated:

> "At Heublein's request, the New York Stock Exchange suspended trading in the company's stock. There is

a matter in mid-stream of development and the company expects to have a statement tomorrow."

On Wednesday, July 29, special meetings of the Reynolds and Heublein Boards approved the proposed acquisition. Just prior to the meeting of the Heublein Board, Waldron, over the objection of the investment banker, had agreed to the Reynolds condition calling for withdrawal rights if another party acquired 33⅓%. At the conclusion of the meetings, the merger was publicly announced.

ARGUMENT

I.

The courts below properly enunciated and applied the principles of law governing corporate disclosure.

The courts below held that on the facts of this case, there was no affirmative duty of disclosure for Heublein to set forth its preliminary contacts with Reynolds prior to July 27, and that its July 14 press release was not false and misleading. The principles of law enunciated by the courts were correct and in accord with the principles announced by the other Circuit Courts which have addressed these questions.

A. Heublein Had No Independent Duty of Disclosure of its Preliminary Contacts with Reynolds

The courts below held that for an affirmative duty to disclose to arise in the context of merger negotiations, the parties must have reached an agreement in principle (A11; A78-79). Both courts concluded that no agreement in principle had been reached prior to the time Greenfield sold his

stock, because there had been no agreement between Reynolds and Heublein as to price and structure. (A12; A81).

Petitioner does not contend that the standard of an "agreement in principle," previously adopted by the Third Circuit in the context of preliminary merger discussions (*Staffin* v. *Greenberg*, 672 F.2d 1196 (3d Cir. 1981)) is incorrect (Pet. Br., pp. 29-32). Nor does Petitioner contend that there is any conflict in the Circuits on this issue.* Rather he argues only that the application of the standard to the facts of this case was incorrect.

The Court of Appeals fully considered Greenfield's argument that an agreement in principle should not be governed by the determination of whether there was agreement on price and structure. It was clear on the record below that price had not been discussed, much less agreed to, prior to the time that Greenfield sold his stock. (A13; A84). In rejecting Petitioner's argument that this should not be determinative, the Third Circuit pointed out that "merger negotiations arise in a wide variety of circumstances and the standard used to determine when disclosure of these is required must be both flexible and specific." (A12). The court noted that price and structure "are typically critical aspects of any merger" and that agreement on these matters "provides concrete evidence of a mature understanding between the negotiating corporations." (A13). Furthermore, this test permits a corporation to make a sensible determination of when disclosure is appropriate as it "constitute[s] a usable and definite measure for determining when disclosures need be made."

* The Second Circuit adopted a comparable standard in *Reiss* v. *Pan American World Airways, Inc.*, 711 F.2d 11 (2d Cir. 1983).

(A13). Finally, the court pointed out that "with both price and structure agreed to, there is only a minimal chance that a public announcement would quash the deal or that the investing public would be misled as to likely corporate activity." (A13).

Petitioner argued below and argues here that in this particular transaction questions of price and structure were not really significant. This argument, which is without support in the record, was rejected by both the District Court and the Court of Appeals.* Indeed, the dissent in the Court of Appeals agreed that no agreement in principle had been reached as a result of Heublein's initial contacts with Reynolds. (A20).

As the Third Circuit stated, the adoption of the subjective "intent of the parties to merge" standard suggested by Petitioner would be inappropriate:

> "Such a standard would leave both courts and corporations with insufficient guidance to determine when disclosure of merger negotiations should be made. This uncertainty, coupled with the possibility of substantial liability for tardy disclosure, would likely result in corporations issuing early public statements announcing the details of all merger talks. Not only would this have a disruptive effect on the stock markets, but, considering the delicate nature of most merger discussions, might seriously inhibit such acquisitive ventures." (A12).

* Petitioner bravely tries to dismiss the failure to reach agreement on July 26 on the question of price as simply a charade and unimportant (Pet. Br., pp. 11-12). He fails to note that at the close of the day, the parties were approximately $12 a share apart or approximately $260,000,000. It was only by dint of all-day negotiations the next day that the agreement was reached.

The Circuits which have addressed this matter have likewise concluded that preliminary merger negotiations such as involved here are immaterial as a matter of law. *See Staffin* v. *Greenberg, supra,* 672 F.2d at 1206; *Susquehanna Corp.* v. *Pan American Sulphur Corp.,* 423 F.2d 1075, 1084-85 (5th Cir. 1970). The reasoning behind these decisions has been explicated by the Second Circuit in *Reiss* v. *Pan American World Airways, Inc.,* 711 F.2d 11 (2d Cir. 1983), in which the Court stated:

> "Such negotiations are inherently fluid and the eventual outcome is shrouded in uncertainty. Disclosure may in fact be more misleading than secrecy so far as investment decisions are concerned. We are not confronted here with a failure to disclose hard facts which definitely affect a company's financial prospects. Rather, we deal with complex bargaining between two (and often more) parties which may fail as well as succeed, or may succeed on terms which vary greatly from those under consideration at the suggested time of disclosure. We have no doubt that had Pan Am disclosed the existence of negotiations . . . and had those negotiations failed, we would have been asked to decide a section 10b-5 action challenging that disclosure. . . .
>
> * * *
>
> Plaintiffs will at best be able to prove that Pan Am failed to disclose the negotiations with National because it feared that disclosure would be misleading under the circumstances or would adversely affect the negotiations themselves. In neither case are investors well served by a rule compelling disclosure. *See Staffin, supra.*" *Id.* at 14.

It should be noted that Respondents argued below, based on the *Staffin* case in the Third Circuit and on *Securities & Exchange Commission* v. *Texas Gulf Sulphur Co.,* 401 F.2d

833 (2d Cir. 1968), *cert. denied,* 394 U.S. 976 (1969), that so long as Heublein was not itself trading in its own securities, it had no independent duty to disclose its preliminary meetings with Reynolds. Thus, putting aside the question of whether an agreement in principle was reached, no duty of disclosure existed. This is a separate ground on which the judgment below should be upheld.

B. The Court Below Found the Press Release Not Misleading Under Established Legal Principles

Petitioner contends that certiorari should be granted to resolve a supposed conflict in the Circuit Courts with respect to the standard for determining whether a press release is misleading. However, this argument can only be made by completely ignoring the opinions below.

The courts below followed well-established legal principles, as to which there are no conflict, in holding that "although a corporation may be under no duty to disclose information, if it voluntarily chooses to make a public statement such a statement may not be 'false or misleading or . . . so incomplete as to mislead. . . ,' " quoting the Second Circuit in *Securities & Exchange Commission* v. *Texas Gulf Sulphur Co., supra,* 401 F.2d at 862. (A15-16). Thus, the Third Circuit is fully in accord with the Second Circuit and every other Circuit that has considered this issue with respect to the proper legal standard. Petitioner's quarrel with the Third Circuit and District Court decisions comes down to a dispute as to whether, on the facts of this case, the press release issued by Heublein on July 14 was misleading or not.

Indeed, Greenfield can find nothing wrong with Heublein's July 14 statement that "the Company was aware of

no reason which would explain the activity in its stock in trading on the New York Stock Exchange today." He admits that such statement was literally true (Pet. Br., p. 17), but suggests that the Company was under a duty to investigate and to determine the reason that would explain the activity. Greenfield suggests that there could have been a leak of either the July 9 Reynolds meeting or the state of the General Cinema negotiations. He also suggests that Heublein should have issued a press release which disclosed such possibilities, and in essence would constitute the Company's speculation as to the reason for the increased trading.

Despite full discovery below, Greenfield was unable to point to any evidence that there was in fact a leak, or that any leak was responsible for the increased trading, or that Heublein had any information which would suggest that such was the case. As the Court of Appeals stated, despite full discovery, Greenfield "alerted the district court to no evidence which might tend to prove, that any of the details of these discussions . . . had been recently leaked." (A17). From Heublein's perspective, the one meeting with Reynolds had been kept in the greatest confidence. Only the two chief officers of the Company, Waldron and Watson, and two other high officers, Gillespie and Caspar, were even aware of the July 9 meeting. The only other persons aware of it were the three outside advisors, and each had been advised of the strict confidentiality of the matter.*

* Greenfield refers to the New York Stock Exchange Manual which describes the problem of confidentiality when "outsiders" are brought in to conduct studies or assist in preparing for contemplated transactions. (Pet. Br., p. 24). This comment refers to a different situation than obtained here; no outsiders had been asked to conduct studies, and no one was involved in putting together merger documents or the like. Three individuals with the closest possible confidential relationship to the Company had simply been advised of a meeting.

There was no evidence below that Heublein was in any way responsible for any leak or for any rumor. In such circumstances the Second Circuit has repeatedly ruled that under the federal securities laws, a corporation is under no duty to verify or correct a rumor which is in no way attributable to it. *See State Teachers Retirement Board* v. *Fluor Corp.*, 654 F.2d 843, 850 (2d Cir. 1981); *Elkind* v. *Liggett & Myers, Inc.*, 635 F.2d 156, 163 (2d Cir. 1980); *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 949 (2d Cir. 1969). Greenfield points to no conflicting authorities.

Put another way, there were no material facts for Heublein to disclose on July 14, as to which nondisclosure made the release materially misleading. The Court of Appeals stated:

> "As we have previously established, on July 14, Heublein was under no duty to disclose, and had not dislosed, the substantive elements of its discussions with either Reynolds or General Cinema. Each discussion was in a preliminary stage and no 'agreement in principle,' or any functional equivalent thereof, had been reached." (A17).

There were thus no material facts to disclose and speculation by Heublein regarding market rumors as to which it knew no more than did the Exchange or the market would have been improper.' (See A86-88).

Greenfield attempts to construct an argument from the reference in the New York Stock Exchange Manual to calls by the Exchange regarding developments "which could be responsible for unusual market activity." (Pet. Br., p. 23). No court has interpreted the use of "could" rather than

"would" in that sentence as an invitation for a company to speculate, without factual basis, regarding movements in its stock; as noted above, the Second Circuit has on several occasions rejected placing any such obligation on a listed company. Moreover, the record below is clear that the request made to Caspar was not to speculate, but to advise the Exchange whether there were any material corporate developments or not.*

Finally, what Greenfield's argument comes down to is the suggestion that this Court should take certiorari in order to announce a rule that in certain circumstances where there has been a preliminary meeting, a company should either disclose the details of those inchoate discussions or issue a no-comment statement in response to a Stock Exchange inquiry. Such a rule would be inappropriate on the facts of this case and could not comprehend the myriad factual situations in which corporate disclosure problems arise.

The first alternative would require public companies to disclose delicate discussions any time that market activity in its stock changes suddenly, whatever the reason, even where the company did not cause or know of the cause of the activity. Such a rule would place public corporations in the untenable position of making premature announcements that could expose the company to 10b-5 actions if the

* The entire record on the subject consists of Caspar's testimony:

"Q. Would you give me, please, your recollection of what was said in that conversation in as much detail as you can recall?

A. As I recall it, the call came at the end of the trading day, shortly before the New York Stock Exchange closed at 4 o'clock and the call came from Mr. Conneally I believe. . . .

And he wanted to know if we could issue a No Corporate Development Statement." (JA1373).

negotiations fell through. *Reiss* v. *Pan American World Airways, Inc., supra,* at 14. Furthermore, as the court in *Staffin* v. *Greenberg, supra,* 672 F.2d 1196, expressly recognized, the act of disclosure could itself jeopardize the successful conclusion of pending negotiations, and thereby greatly increase the risk that all shareholders, not just those who speculated on the possibility of a merger, would be injured. *Id.* at 1206.

The other proposed alternative—that Heublein should have said "no comment"—carries with it the implication that if such a statement had been issued, Greenfield would have guessed that there was a material corporate development and would not have sold his Heublein stock. There are numerous reasons why such a general rule would be inappropriate. First, a no-comment response would not have answered the Exchange's inquiry, an inquiry to which Heublein made a conscientious effort to respond. Second, given Greenfield's interpretation of the meaning of "no-comment"—that is, as suggesting that there was a material corporate development brewing—such a statement would have elevated what was not a material corporate development into just that. Indeed, in contrast to the measured and objective response which was in fact made, a no-comment response would likely have fanned the flames of speculation with all the attendant damage to shareholders which has been referred to by numerous courts. *See, e.g., Reiss* v. *Pan American World Airways, Inc., supra,* 711 F.2d at 14; *Staffin* v. *Greenberg, supra,* 672 F.2d at 1206-07.

II.

The lower courts properly applied the *Northway* test of materiality.

Finally, Greenfield argues that the Circuit Court applied an improper standard of materiality, and therefore failed to appreciate that the "breakdown" of General Cinema-Heublein discussions on July 23 rose to the level of a material fact which should have been disclosed. This argument is totally specious, both in its analysis of the standard applied by the court and its application to the facts.

The Circuit Court rejected Greenfield's argument regarding the materiality of the July 23 events as follows:

> "Failure to agree is not the negative equivalent of an agreement in principle. If parties reach an agreement in principle, they formally change their relative positions; if they fail to reach such an agreement, they are simply left in the same positions they would have been had no negotiations taken place. Thus, while an agreement in principle to merge, as a matter of law, constitutes a material corporate development requiring public disclosure, the failure to agree may well constitute no development at all, only, at best, a foregone opportunity. Such was the case here. Both before the negotiations began and after they were abandoned General Cinema . . . was, at least implicitly, in a position to increase that stake through continued open market purchases. Both before and after, Heublein considered these purchases to represent hostile action and was pursuing strategies designed to block General Cinema's takeover activity." (A15).

Greenfield focuses on the next sentence of the opinion which states that the breakdown of the negotiations "did not materially change the relative positions of either corporation. . . ." He suggests that the court should have focused not on the corporations' positions but on the expectations of the shareholders, and that the failure to do so was a repudiation of this Court's decision in *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438 (1976). Again, like his argument regarding "could" and "would", Greenfield's argument amounts to playing with words and has no substance.

The basic thrust of the *Northway* decision was a rejection of a subjective standard of materiality—phrased in terms of what "*might* have been considered important by a reasonable shareholder" (*Id.* at 447) (emphasis added) —in favor of the objective standard that "an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." (*Id.* at 449). The Third Circuit clearly looked upon the test of materiality as an objective one. It is evident that in focusing upon the fact that, as a result of the July 23 discussions, there was no actual change in the corporations' positions, the Third Circuit was applying such a standard. If there was no actual change in the corporations' positions—that is, they were still in disagreement, as they always had been—there could hardly have been, from an objective viewpoint, any new material fact regarding those positions that needed to be disclosed. There was no error in the lower court's application of the materiality standard.

Numerous other considerations support the holding that Heublein was correct in not issuing a press release describing its July 23 discussion with General Cinema. To begin with, since Heublein was not in the market, there was no affirmative duty of disclosure.* Moreover, there was in fact no formal breakdown of talks. All that happened was that Waldron unilaterally became exasperated with General Cinema and decided to pursue serious discussions with Reynolds. If the Reynolds discussions had not resulted in a transaction, there is no reason why Waldron could not have picked up his discussions with General Cinema where they had been left on July 23. To require disclosure of the inconclusive July 23 discussions between Heublein and General Cinema would have violated the teaching of cases such as *Reiss* v. *Pan American Airways, Inc., supra,* 711 F.2d 11, that disclosure of fluid negotiations "may in fact be more misleading than secrecy." *Id.* at 14.

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* The state of the public record with respect to Heublein *vis-a-vis* General Cinema was in no way misleading. General Cinema had purchased 18.9% of Heublein stock; had stated in a Schedule 13D in early June that it had ceased purchasing Heublein stock pending discussions with Heublein; and had further reserved the right in that Schedule to resume purchases if it did not reach agreement. Neither General Cinema nor Heublein had subsequently issued releases reporting the ebb and flow of the subsequent negotiations. For General Cinema to resume buying, it would have been required to amend its Schedule 13D, thereby giving notice to shareholders.

Conclusion

For the foregoing reason, Greenfield's petition for a writ of certiorari should be denied.

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